88-1912

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. _____

EDWARD LITTLE PETITIONER

vs.

A. L. LOCKHART, Director of Arkansas Department of Corrections RESPONDENT

* *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* *

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26 pp

QUESTIONS PRESENTED:

WHETHER A MINOR HAS THE LEGAL CAPACITY TO WAIVE CONSTITUTIONAL OR STATUTORY RIGHTS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, EDWARD LITTLE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on February 27, 1988.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached hereto as Exhibit "A".

II. JURISDICTION

The opinion of the Court of Appeals was filed on February 27, 1988. This petition is filed within sixty (60) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (i).

III. CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

Rule 36.1 of the Arkansas Rules of Criminal Procedure reads as follows:

> "Any person convicted of a misdemeanor or a felony by virtue of trial in any Circuit Court of this State has the right to appeal the Arkansas Court of Appeals or to the Supreme Court of Arkansas . . ."

IV. STATEMENT OF THE CASE

Petitioner was convicted in Pulaski County,

Arkansas, in the Circuit Court, for capitol murder and was sentenced to life without parole. After filing his Notice of Appeal with the trial court, Petitioner signed an Affidavit allowing his attorney to file a motion dismissing his appeal. On January 22, 1985, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court to the Eastern District of Arkansas, alleging that he was not informed of the consequences of his waiver and therefore the waiver was not knowingly and intelligently made and also alleged ineffective assistance of counsel. A hearing was held in Pine Bluff, Arkansas on March 5, 1987 before the Honorable John F. Forster, Jr., the United States Magistrate for the Eastern District of Arkansas. Petitioner raised that at the hearing the issue of whether a minor has the legal capacity to waive his right to appeal.

On September 8, 1987, Judge Forster entered a Proposed Findings of Fact and Conclusion of Law that, among other things, found that there was no per se rule controlling the legal capacity of a minor to act in a constitutional case and Petitioner's Petition for Writ of Habeas Corpus was denied and dismissed. On February 18, 1988, the Honorable Judge Henry Woods, the United States District Judge for the Eastern District of Arkansas, entered an Order adopting the magistrates Proposed Findings of Fact and Conclusions of Law and the memorandum in order. Petitioner then timely filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit wherein Petitioner raised the point of whether a minor has the legal capacity to waive his right to appeal.

In its opinion, the Court of appeals stated on this

issue that a Defendant may relinquish constitutional rights by making a knowing and intelligent waiver. Johnson vs. Zerbst, 304 U.S. 548, 464 (1938). He went on to cite the case of the United States vs. White Bear, 668 F.2d 409, 412 (8th Circuit 1982) dealing with a seventeen year old Defendant not being deprived of due process or fundamental fairness. The Court went on to find that the District Court was not bound to create a new rule of law by holding that the minor was legally incapable of waiving an appeal and the Eighth Circuit declined to create such a new rule. It is submitted that a minor does not have the legal capacity to waive a right, and that the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

V. REASONS FOR GRANTING THE WRIT

A MINOR DOES NOT HAVE THE LEGAL CAPACITY TO WAIVE A RIGHT.

It is well settled in the law that minors lack the capacity to make legally binding decisions. Thus public policy demands legal protection of the person and property rights of juveniles. In Arkansas, a minor has a right to disaffirm a contract for non-necessaries at any time during his minority and for a reasonable time thereafter. Camp vs. Bank of Bentonville, 230 Ark. 414, 323 S.W.2d 556. A boy under eighteen years of age connot make a valid Will in Arkansas (Ark. Code Ann. § 28-25-101). Minors under the age of seventeen may not donate blood (Ark. Code Ann. § 20-27-301). Any civil action of a minor must be brought by his guardian or next friend (Ark. Code Ann. § 16-61-103). The defense of an infant in a civil action must be

by his regular guardian or by a guardian appointed for that purpose, and no judgment can be rendered against an infant until after defense by a guardian (Ark. Code Ann. § 16-61-104). A notice to an infant must be served on the guardian or next friend, bringing or defending the action for him (Ark. Code Ann. § 16-55-116). Thus, had Petitioner been involved in a civil lawsuit regarding some common law property rights, rather than his rights under the constitution or a statute, he would not have been allowed to discontinue or dismiss that suit without his guardian's permission. It is an anomaly, therefore, that a minor such as Petitioner conceivably might waive on his own, his right to appeal his conviction in a capital murder case wherein his very liberty is threatened, but must have the assistance and advice of a guardian if someone is about to force the sale of a piece of real

property in which the minor owns even a infinitesimal interest.

The Petitioner was not only a minor, but clearly did not have the education or sophistication of the average sixteen year old at the time he dismissed his appeal. There is ample evidence that the Petitioner was semi-illiterate at the time of dismissal and completely ignorant of the law. Neither the affidavit that he signed, nor the motion filed in his behalf by his attorney ever states specifically what the Petitioner was told that induced him to dismiss the appeal. The Petitioner contends that when dealing with a sixteen year old semi-illiterate in prison with a capital murder conviction should have at least been afforded the appointment of a guardian to determine absolutely that he fully understood what rights he was giving up, both as to his appeal in the State Court and his right to take his case to the

Federal Court System. Petitioner contended at his Habeas Corpus hearing and in his Brief for the Eighth Circuit that he dropped his appeal on the advice of counsel on the erroneous advice that if he prevailed on appeal and got a new trial, he could be facing the death penalty again. His attorney denied this, however.

Various Courts when dealing with minors have adopted the totality of the circumstances test as set out in Rone vs. Wyrick, 764 F.2d 532 (Eighth Circuit 1985) and also have looked at various factors to consider whenever reviewing the waiver of rights by a juvenile such as age, education, intelligence, lack of advice, length of detention, length and nature of questioning, and use of physical force. Smith vs. State, 286 Ark. 247, 691 S.W.2d 154 (1985). However, in Williams vs. Huff, 142 F.2d 91, the Court dealt with the question

of whether seventeen year old boys were competent to waive right to counsel in a criminal case. The author of the opinion stated that it seemed to him that as a matter of law a boy of seventeen could not competently waive his right to counsel in a criminal case. Several states have legislatively mandated that an adult be present when a juvenile waives constitutional rights. Colorado Revise Statutes Annotated 2d., § 19-2-102 (3) (C) (I); Oklahoma Statues Annotated Title 10, § 1109 (a) (Supp. 1975-76); Texas Family Code, § 51.10 (1973). Commentary to these statutes teaches that the juvenile's right to counsel should be non-waivable, citing a 1967 recommendation by the President's Commission on Law Enforcement and Administration of Justice, IJA/ABA Juvenile Justice Standards Project, Standard Relating to Adjudication, § 1.2 (1977).

Petitioner would agree with the magistrate in the Federal District Court and found that there is no per se rule regarding this issue and Petitioner, therefore, prays that this Court grant his Writ to definitely decide this issue. For the above reasons, Petitioner prays that his Writ be granted.

Respectfully submitted,
EDWARD LITTLE

John R. VanWinkle
SEXTON LAW FIRM, P.A.
Attorneys at Law
P.O. Box 1526
Fort Smith, Arkansas 72902
Phone 501-782-8958

CERTIFICATE OF SERVICE

I, John R. VanWinkle, do hereby certify that I have served a true and exact copy of the above and foregoing Petition upon Jack Gillian, Attorney General's Office, Heritage West Building, 201 East Markham, Little Rock, AR 72201 by mailing a copy of same this 25th day of April, 1989.

John R. VanWinkle

1458M

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EDWARD LITTLE PETITIONER

vs. NO: PB-C-85-32

A. L. LOCKHART, Director RESPONDENT
Arkansas Department of Correction

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Petitioner, Edward Little, is serving a life sentence, plus fifty (50) years, plus twenty (20) years, in the Arkansas Department of Correction following his 1980 convictions on charges of capital murder, aggravated robbery, and first degree battery. Petitioner seeks habeas relief on the ground that he unknowingly and unintelligently waived his right to a direct appeal due to erroneous advice given by his attorney. A hearing

was conducted before the Magistrate.[1]

Petitioner was 16 years old when he was convicted of capital murder on November 19, 1980. The Pulaski County (Arkansas) Prosecuting Attorney unsuccessfully sought the death penalty. Petitioner's court-appointed attorneys filed a notice of appeal. In July of 1981, Petitioner's attorney and a law student visited Petitioner in prison. During that visit, Petitioner signed an affidavit stating that he wished to dismiss the appeal of his 1980 conviction. The attorney filed Petitioner's affidavit and a motion to dismiss the appeal. The Arkansas Supreme Court dismissed Petitioner's appeal on September 14, 1981. Petitioner's subsequent attempts to reinstate his appeal were rejected. Respondent concedes that Petitioner's avaialable state remedies are

[1]The HONORABLE JOHN F. FORSTER, JR., United States Magistrate for the Eastern District of Arkansas.

exhausted.

Petitioner and his witnesses testified that the attorney told Petitioner that he should drop the appeal because he might get the death penalty in a second trial. Petitioner and his witnesses also testified that the attorney promised Petitioner that he would be able to get relief from his convictions in federal court after by-passing state appellate remedies. Indeed, Petitioner's Exhibit No. 3 is a copy of a letter from the attorney to Petitioner, dated April 6, 1984, discussing possible post-conviction efforts in federal court.

The advice which Petitioner attributes to his attorney was incorrect. The state is prohibited from seeking the death penalty a second time in a retrial where the death penalty was sought unsuccessfully in the first trial. Bullington v. Missouri, 451 U.S. 430 (1981). It is also well settled that a criminal

defendant may not deliberately by-pass his constitutional claims in state court in hopes of a more favorable ruling in federal court. His claims will be barred in federal court. Wainwright v. Sykes, 433 U.S. 72 (1977); Fay v. Noia, 372 U.S. 391 (1963). Advising Petitioner that he would face the death penalty upon retrial if he continued his appeal, and advising him that he could abandon his state court appeal to pursue federal remedies would be, in the Magistrate's opinion, ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 688 (1984).

However, Petitioner's attorney testified that he gave no such advice and actually counseled Petitioner against dismissing the appeal. The attorney's testimony is corroborated by the record. Petitioner's Exhibit No. 1 is a copy of an affidavit signed by Petitioner averring that he had been advised of the

law and wanted his appeal dismissed. Petitioner's Exhibit No. 2 is a copy of the motion for dismissal filed by the attorney. In the motion, the attorney states that the appeal was filed over Petitioner's objections and that Petitioner wanted the appeal dismissed contrary to the attorney's advice. The fact that Petitioner never wanted an appeal is also corroborated by the testimony of others involved with the 1980 trial.

The Magistrate finds that the weight of the evidence is in the attorney's favor. Petitioner was not advised, by his attorney, that he could face the death penalty upon retrial unless he dropped his appeal. Nor did the attorney advise Petitioner that he should dismiss his state court appeal to pursue federal remedies. Therefore, the ineffective assistance of counsel claim is without merit.

A separate issue is whether Petitioner made a

knowing and intelligent waiver of his right to appeal, notwithstanding his representation by counsel. It is undisputed that a criminal defendant may waive his constitutional rights, even in a death case, if he is competent to make such a decision and does so voluntarily. Smith v. Armontrout, 812 F.2d 1050 (8th Cir. 1987). During the evidentiary hearing the issue of whether a 16 year old defendant charged with capital murder should be deemed competent to waive his right to appeal was raised as a matter of public policy. Counsel for the parties filed post-hearing briefs on this issue. After an independent review of the law, the Magistrate concludes that there is no per se rule controlling the legal capacity of a minor to act in a constitutional case. Rone v. Wyrick, 764 F.2d 532 (8th Cir. 1985). Rone adopts a totality of the circumstances test to determine knowingness and voluntariness.

In Smith v. State, 286 Ark. 247, 691 S.W.2d 154 (1985), the Arkansas Supreme Court noted several factors to consider when reviewing the waiver of rights by a juvenile. They are: age, education, intelligence, lack of advice, length of detention, length and nature of questioning, and use of physical force.

Applying the totality of the circumstances test in Rone and the Smith factors, the Magistrate concludes that Petitioner's dismissal of his appeal was knowing and voluntary. Petitioner had a 7th grade education; he could read; he suffered no apparent or reported mental defects; he was not under duress; and appeared to have the intelligence of an average 16 year old.

Therefore, the Magistrate recommends that Petitioner's petition for a writ of habeas corpus be denied and dismissed.

John D. Tinsley, Jr.
UNITED STATES MAGISTRATE

DATE: September 8, 1987

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EDWARD LITTLE PLAINTIFF

VS. NO. PB-C-85-32

A.L. LOCKHART, Director of Arkansas Department of Corrections DEFENDANT

ORDER

After reviewing plaintiff's objections to the recommended disposition, the court readopts the Magistrate's proposed findings and conclusions in the Memorandum and Order.

Dated this February 17, 1988.

United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 88-1448

Edward Little,	*	
	*	
Appellant,	*	
	*	
	*	
v.	*	Appeal from the United
	*	States District Court
	*	for the Eastern District
	*	of Arkansas.
	*	
A.L. Lockhart, Director	*	
Arkansas Department	*	
of Correction,	*	
	*	
Appellee.	*	

Submitted: December 13, 1988

Filed: February 27, 1989

Before McMILLIAN and BEAM, Circuit Judges,

and WHIPPLE,* District Judge.

WHIPPLE, District Judge

Appellant, Edward Little, appeals from an order of the United States District Court for the Eastern District of Arkansas[1] adopting a magistrate's[2] recommendation to deny a petition for a writ of habeas corpus. Appellant raises three points on appeal, asserting (1) ineffective assistance of counsel at trial, (2) that he did not knowingly and voluntarily dismiss his prior appeal, and (3) a minor has no capacity to waive an appeal. For the reasons set forth below, the decision of the district court will be affirmed.

Appellant was convicted in Pulaski County, Arkan-

*The HONORABLE DEAN WHIPPLE, United States District Judge for the Western District of Missouri, sitting by designation.

[1]The HONORABLE HENRY WOODS.

[2]The HONORABLE JOHN F. FORSTER, JR.

sas, Circuit Court of capital murder and was sentenced to life without parole. After filing his notice of appeal with the trial court, appellant signed an affidavit allowing his attorney to file a motion dismissing his appeal. On January 22, 1985, appellant filed a petition for a writ of habeas corpus in United States District Court. In the petition, appellant alleged he was not informed of the consequences of his waiver and, therefore, the waiver was not made knowingly and intelligently. He also alleged ineffective assistance of counsel.

In a hearing on March 5, 1987, before the magistrate, appellant raised the issue of whether a minor has the legal capacity to waive his constitutional right to an appeal. The magistrate submitted proposed findings of fact and conclusions of law on September 8, 1987. The magistrate found (1) the ineffective-assistance claim had no merit, (2) the

appeal dismissal was knowing and voluntary, and (3) there was no rule that a minor is legally incapable of waiving appeal. The district court judge adopted the proposed findings of fact, conclusions of law, and recommendation in an order entered by the district judge on February 18, 1988.

Regarding ineffective assistance of counsel, appellant contends he dropped his appeal to the Arkansas Supreme Court because his attorney advised him to dismiss the appeal. Appellant contends his attorney told him that if he prevailed on the appeal and got a new trial, he could be facing the death penalty again. Appellant also contends this attorney advised him that the attorney would pursue the appeal through federal court. Testimony of three inmates at the magistrate's hearing supported appellant.

However, other testimony was contrary to appel-

lant's contention. His trial counsel testified that he did not urge appellant to drop the appeal, or that he could face a worse penalty. Trial counsel also testified that the notice of appeal was filed over appellant's objections because the attorneys hoped he would change his mind and agree to an appeal. One trial attorney further testified that the decision to dismiss the appeal was against his advice. An affidavit signed by appellant, and accompanying the motion to dismiss the appeal, said the appeal had been filed over his objection and was being dismissed at his request.

The magistrate made a credibility determination in resolving the conflict between the inmates' testimony and the lawyers' testimony. The magistrate chose to believe the lawyers. The district court adopted that finding. Credibility determinations are to be upheld unless they are clearly erroneous.

See Anderson v. City of Bessemer City, 470 U.S. 564, 574-575 (1985). A reviewing court is to afford great deference to a trial judge's findings of fact because of the trial judge's ability to assess demeanor and tone of voice of the witness. Id., 470 U.S. at 574-575.

Considering the conflicting evidence, and the need to make credibility determinations, we cannot say the district court was clearly erroneous in adopting the magistrate's proposed findings of fact and the recommendation. The district court will be affirmed in regard to the claim of ineffective assistance of counsel.

In regard to the voluntariness issue, appellant relies upon his youth to assert his dismissal of appeal was not voluntary. Appellant was sixteen years old when the appeal was dismissed. The evidence conflicted somewhat on how well or poorly

appellant could read. Appellant claimed he could read only at a second-grade or third-grade level. His trial counsel testified that they provided books to appellant at his request, and that they talked with appellant about the books--leading the trial attorneys to conclude he could read.

There was evidence that, in an independent evaluation on behalf of the defense, appellant was competent to stand trial. There was further evidence that appeallant had resisted an appeal, even though his rights had been explained to him. A totality-of-the circumstances approach was applied in Fare v. Michael C., 442 U.S. 707, 725 (1979) to determine whether a juvenile has waived his rights. The evaluation includes the juvenile's age, experience, education, background, intelligence, and whether he has the capacity to understand the warnings given to him, the nature of the rights and the con-

sequences of waiving. Id.

Upon a review of the record, there appears to be ample credible evidence to support the finding that the decision to withdraw was made voluntarily and knowingly. The totality of the circumstances reveals that the decision was made with intelligence, knowledge and voluntariness. We cannot say that the district court was clearly erroneous in adopting that finding.

In regard to the claim that a minor cannot waive appeal, we decline to make new law on that point. A defendant may relinquish constitutional rights by making a knowing and intelligent waiver. See, Johnson v. Zerbst, 304 U.S. 458, 464 (1938). And it is well-settled that a minor may waive rights protecting against self-incrimination. See United States v. White Bear, 668 F.2d 409, 412 (8th Cir. 1982) (17-year-old defendant was not deprived due process or

fundamental fairness, and his confession was not the product of threats or ignorance of rights or of adolescent fantasy, fright or despair.) See also, Cotton v. United States, 446 F.2d 107, 110 (8th Cir. 1971) (15-year-old had given voluntary confession, despite his contention that his immaturity prevented a voluntary waiver of constitutional rights--even after a warning of his constitutional rights.)

Certainly appellant's youth is a factor in determining whether he was incapable of waiving his appeal. However, it is only one factor. In light of the other evidence, particularly concerning the advice given to appellant, we cannot say the district court was clearly erroneous in denying the petition for a writ. The district court was not bound to create a new rule of law by holding that minors are legally incapable of waiving an appeal. We also decline to create such a new rule.

We affirm the district court's conclusion that (1) appellant did not suffer from ineffective assistance of counsel, (2) that he knowingly and voluntarily dismissed his original appeal, and (3) that he was legally capable of waiving his appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT